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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

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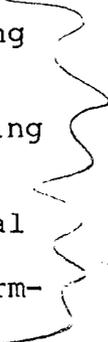
DATE: June 7, 1979

MATTER OF: ENSEC Service Corp.

[Protest of Negotiated Contract Award]

DIGEST:

1. Where negotiated contract is awarded on basis of initial proposals without discussions, contracting officer's refusal to consider offer of waiver of reimbursement for training costs in evaluation of proposals is proper, since evaluation plan does not provide for consideration of training costs in determining low offeror.
2. Award of negotiated contract based on initial proposals is proper where insufficient time is available between solicitation and performance to conduct discussions.
3. Where award is based strictly on cost, and evaluation plan may result in award that does not represent lowest total cost to Government, agency should consider revision to evaluation plan for future procurements.



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AGC 00017*

Incumbent contractor
ENSEC Service Corp. (ENSEC) protests the award by the General Services Administration (GSA) of 90-day interim contracts under request for proposals (RFP) No. 03C8108401 (Neg) and RFP No. 03C8108501 (Neg) for armed security guard services at buildings in Silver Spring, Maryland, and the District of Columbia.

The essentially identical solicitations were issued in early June of 1978, and the same contracting officer conducted both procurements. Each required the offeror to propose a price-per-hour for productive man-hours, and a price-per-hour for supervisory man-hours. Award under each RFP was to be made to the low offeror as determined by multiplying an offeror's prices per-hour by the appropriate estimated number of man-hours listed in the RFP, and adding the total.

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Each solicitation also required certain specified training, the cost of which was to be reimbursed the contractor by the Government at the offeror's man-hour rate. Section VIII of each RFP set out the training requirements in detail and included the following provision:

"Waivers of Training. Contractor employees who can provide written documentation of having completed training that is equal to or that exceeds the requirements set forth in * * * this Section, as particularly herein provided for or within 18 months or 545 days preceding the date of their employment under this contract, may be exempted by the Government from certain portions of the required training. The granting of any exemptions from training is the option of the Contracting Officer or his designee, and exemptions may only be made after the Contractor submits written requests with complete justification, including all pertinent documentation, to these officials. All training will be completed by each employee, except as expressly waived, before they enter on duty. Waivers will be limited by the following circumstances and conditions:

(1) A separate statement must be submitted on each employee for whom a waiver is requested, and approval must be granted by the Government prior to any such employees entering on duty.

(2) In emergency situations the Government may authorize additional posts to be manned by partially trained personnel for short time periods. In this case, the need for any other waivers must be arranged through GSA before the work is performed. * * * ."

ENSEC was the incumbent contractor for the services. In a telephone conversation with the contracting officer prior to the scheduled June 15 receipt of proposals, ENSEC suggested that unless the award method provided for consideration of the extent of training costs that would have to be reimbursed to an offeror if awarded a contract, the proposed price would not properly reflect all the costs to the Government for the services. The contracting officer responded that the procurement would proceed as published.

ENSEC included a cover letter with each of its proposals in which the firm repeated its oral suggestion to the contracting officer, and pointed out that as the incumbent contractor its employees were already adequately trained. ENSEC stated that it would in any case waive its right to be reimbursed for any training for its employees that would be deemed necessary by the contracting officer.

ENSEC was not the low offeror on either solicitation on the basis for evaluation as set out therein, and on June 16 it was advised that the contracts would be awarded to other firms. Awards were made based on initial proposals on June 30.

ENSEC has filed a protest in our Office against the contract awards on the basis of its position as communicated to the contracting officer. In addition, ENSEC ~~contends that since the procurements were negotiated,~~ GSA should have considered the firm's offer to waive all training costs in evaluating proposals for award notwithstanding that the RFPs, as issued did not provide for such consideration.

eval plan

We note at the outset that formal protests against the award methods were not filed in our Office until after the closing dates for receipt of initial proposals under the RFPs. Our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1978), require that a protest against an alleged RFP impropriety must be filed prior to that date. Although oral protests to contracting agencies are acceptable, Federal Procurement Regulations (FPR) § 12.407-8 (1964 ed. amend. 139), we do not believe that the telephone discussion with the contracting officer prior to the time set for receipt of proposals can be construed as a protest, since there is no evidence to suggest that such was ENSEC's intention. See Hydro Conduit Corporation, B-188999,

October 11, 1977, 77-2 CPD 282; Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4. Thus, in our view the protest against the contracting officer's failure to amend the evaluation factors for award to consider the training costs is untimely.

ENSEC nonetheless contends that because these were negotiated procurements, "the Government had an obligation" to consider its offer of a waiver for reimbursement of all training costs, and the contracting officer should have availed himself of an opportunity to save the Government money via negotiations.

In some circumstances we would view ENSEC's position as correct. For example, we have held that:

"* * * the presence or absence of an evaluation factor and the amount thereof can have an impact upon the prices offered and in that sense can affect one of the essential terms (price) of the contract. We believe that any prospective offeror * * * who requests an opportunity to discuss the basis for a particular evaluation factor ordinarily should be accorded such an opportunity. * * * We recognize that opportunity for such discussions might not have resulted in any change in the * * * evaluation factor, but the offeror, at least, might have satisfied itself * * * of the correctness of the administrative position or, in the absence thereof, would have had an opportunity to show the procurement activity wherein it might have erred. Moreover, it is entirely conceivable that changes benefitting the Government could result from such discussions * * * [and the regulations] contemplate the issuance of amendments to the request for proposals which reflect the results of such discussions. * * * [W]e do not believe that an otherwise eligible offeror should be denied the opportunity to discuss the elements of an evaluation

factor which is directly prejudicial to its competitive position." 49 Comp. Gen. 98, 100 (1969).

However, while the portion of the Federal Procurement Regulations governing the use of negotiated procurement procedures require that written and oral discussions be held with all responsible offerors who submitted proposals within a competitive range, there are exceptions, one of which is the situation where time will not permit those discussions. FPR § 1-3.805-1(a)(3) (1964 ed. amend 153). Here, less than one month was available from the time the solicitations were issued (less than two weeks from the time proposals were received) before performance was scheduled to commence. In view of this short time frame available, the contracting officer determined to award the contracts based on the proposals as initially received. In this circumstance, the contracting officer was precluded from considering ENSEC's proposed waiver of any reimbursement for the training costs in his evaluation of the proposals, as once offerors are informed of the criteria against which their proposals are to be evaluated, it is incumbent on the procuring agency to adhere to that criteria or inform all offerors of the changes made in the evaluation scheme. Group Operations, Incorporated, B-185871, July 26, 1976, 76-2 CPD 79. On this basis alone, we conclude that the awards made under these solicitations were proper.

We do believe, however, that ENSEC has raised an issue which may merit consideration in future procurements of these services, since a contract awarded without consideration of the training costs that would have to be reimbursed each offeror might not result in a contract at the lowest cost to the Government.

In this respect, GSA notes that the actual training costs the Government would be required to bear cannot be determined until training waivers are requested by the contractor, e.g., after award. GSA thus cites 52 Comp. Gen. 997 (1973) as support for its position that these costs may not be considered as an evaluation factor because they are speculative. We agree, so long as the training costs cannot be quantified with reasonable

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accuracy. However, it may be feasible to require offerors to furnish the relevant personnel information with their proposals, thereby eliminating the speculative nature of the costs.

We are by separate letter of today bringing the matter to the attention of the Administrator of General Services for consideration in future procurements.


Deputy Comptroller General
of the United States